

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 22, 2007

WILLIAM MATNEY PUTMAN v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Carter County
No. S18111 Lynn W. Brown, Judge

No. E2006-00806-CCA-R3-PC - Filed July 11, 2007

The petitioner, William Matney Putman, was sentenced in 1995 to life without parole, following his guilty plea to first degree murder. Subsequently, he filed a petition for writ of habeas corpus, based upon the fact that life without parole was not a lawful sentence at the time of his sentencing. The post-conviction court agreed and resentenced him to life with parole. He appealed this resentencing, claiming that he could not be resentenced without his consent, which he did not give. We reviewed this claim on appeal and determined that it was without merit. He then filed a petition for post-conviction relief, asserting that trial counsel was ineffective for allowing him to plead guilty to an illegal sentence and resentencing counsel and appeal counsel were ineffective for their roles in not pursuing the petitioner's *pro se* motion to withdraw his 1995 plea. The post-conviction court denied the petition, and, following our review, we affirm that order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and JOHN EVERETT WILLIAMS, JJ., joined.

William Matney Putman, Clifton, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; and Jennifer L. Bledsoe, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

In an order entered on February 8, 2007, this court set out the chronology of this matter:

The petitioner pleaded guilty in February 1995 in the Criminal Court for Carter County to first degree murder and aggravated robbery and was sentenced to concurrent terms of life without parole and twenty years, respectively. No direct appeal was taken. The petitioner filed a petition for writ of habeas corpus in the Circuit Court for Wayne County in December 2002 claiming that his sentence of life

without parole for his murder conviction was void. The trial court agreed and granted the petitioner relief, vacating his illegal sentence of life without parole. The petitioner returned to the conviction court for resentencing. Before the resentencing hearing, the petitioner filed a petition to withdraw his 1995 guilty plea. During the hearing, the petitioner moved to dismiss the petition. Over the petitioner's objection, the trial court resentenced the petitioner to life with parole. This court affirmed the judgment on appeal. See William Matney Putman, No. E2004-02192-CCA-R3-CD (Tenn. Crim. App. Aug. 18, 2005), app. denied (Tenn. Dec. 19, 2005).

In his petition for post-conviction relief, the petitioner claimed that counsel who represented him at his 1995 best interest plea was ineffective because counsel "advise[d] [him] to enter into an illegal plea agreement, which was latter [sic] reversed by a Habeas Corpus Order." He alleged that counsel who represented him at the 2004 habeas corpus proceeding was ineffective, as well, in withdrawing the petitioner's *pro se* "motion [to withdraw his 1995 plea] without his approval or agreement, depriving him of his personal fundamental rights." Further, he alleges that counsel representing him on appeal following the resentencing was ineffective for not designating certain documents for the appellate record as well as failing "to raise the issue[] whether the Trial Court amended the plea agreement to a specific sentence, thus, denying Petitioner the right to have the appeal heard on the merit [sic] of his case."

The post-conviction court denied the petition for post-conviction relief without a hearing, finding both that it was untimely and that, based upon the specifics of his complaint, the petitioner would be unable to show that he was prejudiced by counsel's alleged misdeeds:

[The petitioner] entered pleas of nolo contendere to first degree murder and aggravated robbery in the Criminal Court for Carter County on February 3, 1995, receiving a sentence of life without parole and twenty years concurrent for aggravated robbery. . . . He did not file for post-conviction relief until this matter was filed on January 27, 2006. . . .

[The petitioner] successfully pursued habeas corpus in the Circuit Court for Wayne County which vacated his sentence of life without parole in this court. Life without parole was not available as a sentence for first degree murder at the date of the murder. In further proceedings in the Criminal Court for Carter County[,] the petitioner . . . chose not to withdraw his guilty plea (nolo contendere), whereupon the court imposed a sentence of life with the possibility of parole and subsequently decided that his sentence for aggravated robbery should run concurrently with the life sentence. . . . The petitioner, represented by counsel, argued that under these circumstances the court had no authority to sentence him. This court was affirmed in that matter. See William Matney Putman vs. State of Tennessee, [No. E2004-02192-CCA-R3-CD, 2005 WL 1996634,] Court of Criminal Appeals at Knoxville, filed August 18, 2005. The Tennessee Supreme Court denied [the

petitioner's] application to appeal by order filed December 19, 2005, although of this date no mandate has been received.

[The petitioner] now alleges that he received ineffective assistance of counsel when he entered his plea of nolo contendere in 1995. This allegation is clearly barred by the statute of limitations.

The petitioner further alleges he received ineffective assistance of counsel when he was sentenced by the court on May 11, 2004, and also on appeal of that sentence. However considering the opinion of the Court of Criminal Appeals in the matter, it appears that his choice of not withdrawing his plea of nolo contendere left the trial court with no other option than to impose a sentence of life with the possibility of parole. Furthermore, petitioner states in the current petition that he entered into the "[plea] agreement believing his life without parole sentence in count one (1) was authorized." Under these circumstances[,] the petitioner cannot show any prejudice by the imposition of the lesser sentence of life with the possibility of parole.

Accordingly, the court is of the opinion that the petition in this matter does not state a colorable claim for post-conviction relief.

ANALYSIS

On appeal, the petitioner argues that the post-conviction court erred in concluding that the petition was untimely and he could not show that he was prejudiced as the result of actions or inactions of counsel who represented him at the time of his guilty plea, at his resentencing, and in the appeal of that resentencing.

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2006). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issues of deficient performance of counsel and possible prejudice to the defense are mixed questions of law and fact and, thus, subject to *de novo* review by the appellate court. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in

federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different").

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697, 104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

Since the petitioner pled guilty to the charge against him, there were additional required showings, which he failed to make, to establish that he was entitled to relief. "In cases involving a guilty plea or plea of nolo contendere, the petitioner must show 'prejudice' by demonstrating that,

but for counsel's errors, he would not have pleaded guilty but would have insisted upon going to trial." Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991)). Hill explains the showing of prejudice which must be made by a petitioner who entered a guilty plea:

In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

474 U.S. at 59, 106 S. Ct. at 370.

We first will determine whether the petition was timely.

The petitioner's claim against counsel who represented him at the time of the resentencing is based upon counsel's failure to pursue the petitioner's argument that "if the sentence [imposed in 1995] was determined void, then the entire conviction in count one (1) was void." Contrary to the petitioner's view, his plea of guilty remained intact even though resentencing was required, as our supreme court concluded in Smith v. Lewis, 202 S.W.3d 124, 126 (Tenn. 2006), wherein the court granted habeas corpus relief because the petitioner, at the time of his plea of guilty, was told that he would be required to serve 85% of his sentence rather than 100% as the statute required. Relying on State v. Stephenson, 878 S.W.2d 530 (Tenn. 1994), the court explained that, while the petitioner's sentence could not stand, his conviction for rape of a child remained intact: "The Stephenson cases make clear that, where the illegality infects only the sentence, only the sentence is rendered void and habeas corpus relief may be granted to the extent of the sentence only. In such cases, the underlying conviction remains intact." Smith, 202 S.W.3d at 130.

Thus, the petitioner's basic premise is baseless, for the fact he was to be resentenced did not confer the right to withdraw, or even attack, his 1995 plea of guilty. Accordingly, his post-conviction attempt to attack his 1995 plea of guilty was untimely by years.

The petitioner claims that 1995 guilty plea counsel was ineffective by allowing the petitioner to plead guilty to a sentence which was not available for the offense, ignoring the requirement that he must show he was prejudiced as the result of counsel's alleged errors. In fact, he could not be prejudiced by counsel's error, for it was rectified when he was resentenced to the punishment he should have received in the first place. The petitioner's complaint against resentencing and appellate counsel becomes that they were ineffective in not pursuing his baseless view of his rights. We agree

with the post-conviction court that they could not be ineffective by not pursuing a right which the petitioner did not have in the first place and he could not be prejudiced by their not doing so.

The final complaint of the petitioner on appeal is that the post-conviction court dismissed the petition without a hearing. Tennessee Code Annotated section 40-30-106(f) provides that “if the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed.” In fact, it is clear that the petition was untimely. Further, as we have set out, the petitioner could not show that he was prejudiced by counsel’s alleged actions and inactions. Accordingly, the post-conviction court properly dismissed the petition without a hearing.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

ALAN E. GLENN, JUDGE